SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 335

THE HANOVER SHOE, INC.,
*Petitioner,*

*v.*

UNITED SHOE MACHINERY CORPORATION,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent-defendant United Shoe Machinery Corporation ("United") opposes the petition of The Hanover Shoe, Inc. ("Hanover") for certiorari to review the decision of the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed in part and reversed in part the judgment of the District Court (Sheridan, C.J.) and remanded the action to the District Court for further trial. Should the Court grant Hanover's petition herein at the present interlocutory stage of the proceeding, we submit the Court should have fully before it the errors which United asserts to have been made and to be the proper subject of review on certiorari. Accordingly, in No. United has cross-petitioned for a writ of certiorari, to be granted only in the event the Court grants the petition in No. 335.

Hanover's petition herein fails to state a case appropriate for certiorari under Rule 19 at this time because—

(a) The case at this stage lacks finality;

(b) The "Questions Presented", (Pet. 2-3) are unique and of no general applicability and were correctly decided by the Court of Appeals in the aspects as to which Hanover seeks review;

(c) Independent grounds requiring dismissal of the entire action (as outlined in United's cross-petition for certiorari in No. ) render unnecessary review of the different issues raised in Hanover's petition.

**Questions Presented**

1. Have sufficiently extraordinary grounds been asserted to warrant this Court's exercise of discretionary certiorari jurisdiction where the Court of Appeals has remanded issues to the District Court for further trial and where questions of law have not yet been passed on by the Court of Appeals itself?

2. Have special and important reasons been adequately shown to warrant review of the Court of Appeals' decision that in determining the amount of damage to Hanover resulting from its having leased shoe machinery rather than having purchased it the tax consequences of the alternative means of acquisition must be taken into account?

3. Have special and important reasons been adequately shown to warrant review of the Court of Appeals' decision that the Government decree entered in 1953 which is the basis of Hanover's action should be given retroactive effect only to June, 1946 because prior to that time United's leasing policy was, in the opinion of that court as well as

the judge who entered the decree, "manifestly pursued in the shelter of Supreme Court approval" and in the "absence of predatory practices"?

4. Should certiorari be granted on Hanover's petition where independent grounds exist for dismissal of the entire action?

## Statement of the Case

Continuously from at least 1912 until 1955 plaintiff shoe manufacturer, Hanover, and defendant shoe machinery manufacturer, United, had transactions in shoe machinery manufactured by United and distributed on lease to Hanover for use in the manufacture by it of men's and boys' shoes (6a-7a).* The complaint herein charged United with monopolization of the shoe machinery industry since 1912 and claimed damages by virtue of alleged excessive lease charges and inability to acquire shoe machinery by purchase (11a, 19a). Hanover's action is based on a decree entered in 1953 by the United States District Court for Massachusetts (Wyzanski, J.) in a Government antitrust case against United, which adjudicated monopolization of the shoe machinery business by United. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), aff'd 347 US 527.

The District Court in the instant case entered judgment for Hanover in the amount of $4,239,609, representing treble damages, with interest, and in addition $650,000 attorneys' fees (873a). The basis of the decision was that Hanover would during the damage period have purchased

*Such references are to pages of United's Appendix in the Court of Appeals, filed in this Court together with Hanover's petition herein.

instead of leased the United machinery which it used in its factories and that, although the lease charges were reasonable, the difference between the aggregate lease charges for the machines in question during the damage period and the price for which the Court calculated Hanover could have bought the machines if offered for sale was $1,413,203 (748a-750a, 859a), which amount was then trebled. In the calculation of this amount the District Court excluded three United machines which Hanover leased from United but which the court found could have been substituted for by comparable machines of non-United manufacture, the principal of these being United's Goodyear Outsole Rapid Lockstitch Machine ("ORL") for which plaintiff claimed damages in the amount of $324,326 (800a, 859a). The District Court permitted recovery for the period July 1, 1939 through September 21, 1955 (800a) the first date being fixed by the Court's view of the inception of the Pennsylvania statute of limitations and the latter by the filing of the complaint herein.

On appeals by both parties the Court of Appeals vacated the judgment and directed a new trial as to damages and counsel fees. The Court of Appeals agreed in part with United's claim that the decree adverse to it in the Government antitrust suit should not be retroactively applied and held that in light of "the approval of its leasing policy in various forms by three successive decisions of the Supreme Court" (Pet. 22a) United was justified in its business practices as to the leasing of shoe machinery up to the date in 1946 when this Court approved Judge Learned Hand's holding in the *Alcoa* case (*American Tobacco Co.* v. *United States,* 328 US 781, 811-15) and confined damages to the period commencing at that time. The Court of Appeals also held that the damage period should end not at the date of filing of the complaint herein but on June 1, 1955 when conversion from leasehold to

ownership of the United machines first became possible by reason of Judge Wyzanski's approval of the appropriate plan under the decree. In addition, the Court of Appeals reversed the trial court for its failure to take into account the tax advantages of leasing for the purpose of comparing ownership cost with lease cost, holding that inclusion of such tax factors was essential to a fair comparison of the two methods of acquisition. The Court of Appeals did not pass on the award of $650,000 attorneys' fees but, noting that such award had been based not simply on hours devoted to the case but also on the recovery award, vacated the award for further proceedings in accordance with its opinion relating to the damage period.

On Hanover's appeal from the exclusion of United's ORL machine from the damage calculation by virtue of the availability of another, non-United stitcher, the Court of Appeals deferred decision and remanded the issue for reconsideration as part of the retrial damages.

Petitions for rehearing by both parties were denied, with a further opinion by the Court of Appeals explaining its ruling on the statute of limitations (Pet. 34a-38a).

**Reasons for Denying the Writ**

1. There is no showing of the extraordinary circumstances essential to warrant exercise of certiorari jurisdiction in the absence of a final judgment. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 US 251, 258; *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry.*, 148 US 372, 384. The non-finality of the judgment of the Court of Appeals is settled by decisions of this Court. *Arnold* v. *United States for the Use of W. B. Guimarin & Co.*, 263 US 427; *Martinez* v. *International Banking Corp.*, 220 US 214; *McFarland* v. *Brown*, 187 US 239.

The very issues upon which Hanover seeks review—the extent of retroactivity to be given the Government decree in light of Supreme Court decisions concerning United's operations, and the propriety of taking tax factors into account in computing damages—have been remanded to the District Court for final determination. The legal aspects of these two issues have been adjudicated, but the amount of the tax benefits to be reflected and the amount of damages so computed which is allocable to the shorter period remain to be determined.

Moreover, certain legal issues are as yet unresolved and will remain unresolved even by the Court of Appeals regardless of the action taken by this Court on certiorari or on the merits. The Third Circuit expressly reserved decision on the allowability of damages for the unavailability of the ORL machine until completion of the new trial (Pet. 31a-32a). This item the District Court excluded from its damage award because the competitive Landis Stitcher was comparable and available (245 F. Supp. at 283). As the Court of Appeals said (Pet. 32a):

> "When evidence has been taken on this question on retrial the record may well be different from what is now before us. In these circumstances, therefore, we shall not pass on the sufficiency of the present record to justify the [District Court's] conclusion . . . ."

In addition, the Court of Appeals has declined to pass on the $650,000 attorneys' fee award in light of the new trial ordered, at which such award, based as it is to some extent on a "percentage of the recovery in its original and treble amounts", presumably will be reduced in conjunction with the reduction of damages (Pet. 32a-33a). Indeed, if review were granted and the judgment below affirmed, the

Court of Appeals would still have the additional task of examining the total damage award after the retrial, which in the Court's own view will raise a "number of problems" (Pet. 28a), in light of its instructions to the trial court.

As to what constitutes a final judgment the Court has stated:

> "It follows that although the Appellate Court fixed the rights and liabilities of the parties, it in effect referred a question in the case to the subordinate court for further judicial action; hence the judgment was not final for the purpose of an appeal or writ of error. . . . . Until, therefore, the trial court by its judgment ascertains and fixes the actual indebtedness of the plaintiff and complies with the other directions contained in the mandate it cannot be said that a final decree has been entered in the cause." *Martinez* v. *International Banking Corp.*, 220 US 214, 223.

In the case at bar not only have questions been referred to the subordinate court requiring further judicial action, but the rights and liabilities of the parties remain to be fixed. Thus the lack of finality is more apparent in the case at bar than in the *Martinez* case.

Such piecemeal review should be avoided except in extraordinary circumstances. *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry.*, 148 US 372, 384. It has been stated that "the fact that the decree sought to be reviewed is not final may, of itself, furnish sufficient ground for denial" of the petition for certiorari. Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 130, pp. 232-33 (Wolfson & Kurland, 1951). Accord, *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 US 251, 258; Stern & Gressman, *Supreme Court Practice*, § 4-19, p. 148 (1962).

Extraordinary circumstances warranting review of non-final judgments have been found in issues of pressing public importance, such as the seizure of the steel mills during the Korean War (*Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 US 579), issues of broad fundamental application, such as the right to jury trial (*Beacon Theaters Inc.* v. *Westover,* 359 US 500), or issues fundamental to the further conduct of the litigation (Stern & Gressman, *op. cit. supra,* pp. 148-50). The issues on which Hanover seeks review are of no such character. As will be shown herein, both the tax benefit and the damage period issues are unique to this action and of no general application. Moreover, both can be more readily disposed of after final judgment. Should it choose at that time to grant review and reverse the Court of Appeals, this Court would need only to reinstate the findings at the first trial on those very issues.

2. The aspects of the Court of Appeals' decision which Hanover seeks to have reviewed not only are wholly lacking in importance or general applicability but also are correctly decided.

On the issue whether damages should reflect the tax consequences of purchasing and leasing, the Court of Appeals properly recognized that by owning its shoe machines Hanover would have lost the benefit of the tax deduction for lease and royalty payments to United and would have incurred capital gains taxes on the sale of the machines owned. This seems an obvious point—one which elementary fairness would require to be taken into account if a court is to determine whether in fact Hanover sustained a greater cost in renting its machines from United than it would have sustained if it had purchased them from United.

The sophistry of Hanover's contention is reflected in its misstatement at page 9 of its petition that "the Court of Appeals required Hanover to deduct from its computa-

tion of damages the difference between the tax consequences to it of leasing machinery from the wrongdoer and ownership in a free and open market during the damage period." We do not urge that income taxes be deducted *after* the proper figure has been stated for the damage calculation. What we do urge and what the Court of Appeals has recognized is that the saving on income taxes which Hanover accomplished by taking the annual rentals and royalties as deductions year by year must be taken into account in order to determine whether Hanover did in fact sustain any damage at all and, if so, to what extent.

Hanover attempts to fabricate an "important question of federal law" and even a "difference between circuits" out of *Commissioner* v. *Glenshaw Glass Co.*, 348 US 426, and the decisions of various Courts of Appeals cited in the footnote on pages 11-12 of the petition. *Glenshaw Glass* simply stands for the proposition that a treble damage antitrust recovery constitutes gross income in its entirety under the Internal Revenue Code. Thus, Hanover's recovery will be taxable in its entirety. In none of the Court of Appeals decisions cited on pages 11-12 were taxes relevant to a determination of pecuniary loss. Moreover, the Seventh, Eighth and Ninth Circuit decisions cited by Hanover refute its position by recognizing the expenses that would have been incurred on the hypothesis of no antitrust violations. None of them involves the unique theory of recovery predicated on the difference of cost between leasing machinery and buying machinery—or any analogous theory.

As to the extent of retroactivity to be given the Government decree, that issue must be considered in light of the three earlier decisions of this Court specifically involving United* which were responsible for the nature of the

**United Shoe Machinery Corp.* v. *United States*, 258 US 451; *United States* v. *United Shoe Machinery Corp.*, 247 US 32; *United States* v. *Winslow*, 227 US 202.

decree Judge Wyzanski entered in 1953 in the Government action, which decree forms the very basis of the instant private treble damage suit by Hanover.

In the courts below it was urged by Hanover and denied by United that such decree condemned United's lease-only policy and also should be applied retroactively. The Court of Appeals based its limitation on the retroactive application sought by Hanover on the views expressed by Judge Wyzanski, who was the author of the decree on which Hanover relied (Pet. 20a-22a):

> "Judge Wyzanski made vividly clear the extraordinary position of United in regard to the antitrust laws. Three times, in 1913, in 1918 and in 1922, United had been under the scrutiny of the Supreme Court."
>
> * * * * *
>
> "In Judge Wyzanski's words: 'What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed.' 110 F.Supp. at 348. He held that the last two cases still had enough vitality to prevent his holding, as he otherwise would, that United had violated § 1 of the Sherman Act by its lease-only practice."
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> * * * * *
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> "Judge Wyzanski stressed the absence in United's conduct of predatory practices, which the decisions prior to *Alcoa* had emphasized as an element in monopolization. He held that United's conduct now ran afoul, however, of § 2 under the *Alcoa* doctrine, which brought within its prohibition monopolization attained by conduct which although

> 'honestly industrial' cannot be said to render market control, which is inherently evil, an economically inevitable result, for in such a case it cannot be said of a defendant that greatness was thrust upon him. 110 F.Supp. at 341-42. In so finding, however, Judge Wyzanski said: '. . . Probably few monopolies could produce a record so free from any taint of that kind of wrongdoing.' 110 F.Supp. at 345."

In light of Hanover's reliance on Judge Wyzanski's decree and the latter's view of the earlier legality of United's operations under this Court's three decisions, the Court of Appeals properly refused to permit Hanover to extrude from the decree any treble damage recovery for the period prior to 1946 (Pet. 22a-23a). The court held it erroneous to base damages on that earlier period when, as recognized by Judge Wyzanski, United's operations were "manifestly pursued in the shelter of Supreme Court approval" and in the "absence of predatory practices". (*Ibid.*) By arguing that the damage period has been improperly cut off Hanover has put the cart before the horse. As the Court of Appeals and Judge Wyzanski recognized, but for the *Alcoa* and *American Tobacco* decisions there would be no violation whatsoever in light of the Supreme Court approval of United's operations.

Not only was the decision below in this regard clearly correct so far as it went but the question here raised by Hanover is wholly unique. The real issue is not whether the Court of Appeals should have pushed the decree back prior to 1946 to give further benefit to Hanover but whether the court instead should have determined that the decree did not adjudicate that United's lease-only policy violated the antitrust laws and should have refused to give the

decree any retroactive effect, in light of the presentation below and in United's cross-petition in No.

3. Denial of certiorari is further justified by the existence of independent grounds for dismissal of the entire action.

As is set forth in greater detail in United's cross-petition for certiorari (No. ), the following constitute a bar to Hanover's recovery: (1) Judge Wyzanski's decree did not find an antitrust violation in respect of United's failure to sell shoe machines prior to the decree; (2) Judge Wyzanski recognized that to the extent there was illegality it resulted from a change in the law and his decree was intended to have prospective effect only; (3) the trial court improperly refused on United's motion to certify to Judge Wyzanski the question of what he intended by his own decree; (4) the recognition by both lower courts that the leases between United and Hanover were legal and the lease charges reasonable bars recovery by Hanover; (5) the courts below improperly excluded cost of capital from the comparison of the expense of ownership with the expense of leasing to determine damages, and its inclusion not only would have eliminated damages but would have demonstrated that leasing was more economical than purchasing; (6) Hanover's full recoupment of the machinery lease charges in its sale prices for shoes eliminated all possibility of legal injury; (7) Hanover neither asked to buy the shoe machines nor protested its inability to buy them and the absence of demand bars recovery; and (8) on the trial court's hypothesis that United's lease-only policy was illegal from the inception of relations between the parties in or before 1912, the applicable six-year statute of limitations expired long before the action was commenced in 1955.

Under the circumstances, therefore, interlocutory review of the two unique and far less substantial issues raised by Hanover is especially inappropriate.

## Conclusion

For the reasons stated above, the petition should be denied.

Dated: New York, New York
August 4, 1967

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